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No. 89-53

IN THE

Supreme Court of the United States

October Term, 1989

Missouri Division of Transportation and
Alabama Public Service Commission,
Petitioners,

v.

Interstate Commerce Commission and
United States of America, *et al.*,
Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENT NATIONAL-AMERICAN WHOLESALE GROCERS' ASSOCIATION IN OPPOSITION

OF COUNSEL:

Keller and Heckman
1150 17th Street, N.W., Suite 1000
Washington, D.C. 20036

William H. Borghesani, Jr.*
Terrence D. Jones
1150 17th Street, N.W., Suite 1000
Washington, D.C. 20036
(202) 956-5600

Attorneys for Respondent
National-American Wholesale
Grocers' Association
* Counsel of Record

CASILLAS PRESS, INC., 1717 K STREET, N.W., WASHINGTON, D.C.

COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. Whether the Interstate Commerce Commission ("ICC" or "Commission") has primary jurisdiction to determine, in a declaratory order proceeding, whether a motor carrier subject to its regulatory control may lawfully handle movements within Missouri under the interstate operating authority issued to that carrier by the ICC.

2. Whether a motor carrier regulated by the ICC, confronted with criminal prosecution by the State of Missouri arising out of its operations in that State, may seek a declaratory order from the ICC as to the carrier's ability lawfully to perform the disputed operations under its ICC-issued permit.

3. Whether the ICC's procedures employed for this non-adversary, informal proceeding were fair where an accurate, complete, and legally sufficient notice of the proceeding was published in both the *Federal Register* and the *ICC Register*, and where all interested parties were provided a full opportunity to comment.

4. Whether the ICC correctly concluded that transportation within Missouri of goods that originate out-of-state is in interstate commerce, where the shipper's fixed and persisting intent from the time of initial shipment is that such goods move, not to the shipper's intermediate storage facility in Missouri, but to the locations of its known customers in that State.

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BRIEF FOR RESPONDENT NATIONAL-AMERICAN WHOLESALE GROCERS' ASSOCIATION IN OPPOSITION

The National-American Wholesale Grocers' Association ("NAWGA") respectfully submits, pursuant to Rule 22 of the Rules of this Court, this Brief In Opposition to the Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit for review of that court's decision in *Middlewest Motor Freight Bureau, et al. v. Interstate Commerce Commission* and *United States of America and Steere Tank Lines, Inc. v. Interstate Commerce Commission and*

United States of America, respectively. The opinion of the court of appeals is reported at 867 F.2d 458 (1989) (Pet. App. 1-9).[1] The court upheld an ICC decision that certain motor carrier transportation between points in Missouri could be performed by the carrier pursuant to an interstate permit issued to it by the ICC.

IDENTIFICATION OF RESPONDENT NATIONAL-AMERICAN WHOLESALE GROCERS' ASSOCIATION

NAWGA is a national trade association comprised of grocery wholesale distribution companies which primarily supply and service independent grocers throughout the United States and Canada. It provides research, technical, educational and government relations programs on behalf of its 400 members. NAWGA members operate nearly 1,200 distribution centers nationwide with a combined annual sales volume in excess of $74 billion, accounting for nearly three-fourths of the nation's grocery supply sales. NAWGA members employ in excess of 350,000 people nationwide but, in combination with their independently owned supermarkets, they provide employment for several million people. The independent grocer represents over 50% of the total retail food sales in this country, and is one of the nation's strongest segments of independent business. NAWGA's foodservice division, the International Foodservice Distributors' Association, represents member firms that sell annually over $17 billion in food and related products to the institutional, away-from-home foodservice market. NAWGA celebrated 80 years of service to wholesale grocers in 1986.

[1] "Pet. App." refers to the appendix to the petition for writ of certiorari filed in this case.

NAWGA was a party to the proceeding in the court below as an intervenor in support of the ICC.

STATEMENT

Since the Motor Carrier Act of 1935, 49 Stat. 543-67, 49 U.S.C. § 10101 *et seq.*, the ICC has had regulatory jurisdiction over motor carriers that provide for-hire transportation of property and passengers in interstate commerce (49 U.S.C. § 10521). The statute requires that, before a carrier may conduct such interstate trucking operations (49 U.S.C. § 10921), it must obtain from the ICC either a certificate of public convenience and necessity (49 U.S.C. § 10922) or a motor contract carrier permit (49 U.S.C. § 10923).

Where a dispute exists as to whether certain motor carrier operations are part of interstate transportation and thus capable of being performed under authority issued by the ICC, or whether such operations constitute intrastate service regulated by the states, this Court has held that the ICC is the proper forum for interpreting its authority and resolving the controversy. *Andrew G. Nelson, Inc. v. United States*, 355 U.S. 554, 558 (1958) (*"Nelson"*); *Service Storage & Transfer Co., Inc. v. Commonwealth of Virginia*, 359 U.S. 171, 177 (1959) (*"Service Storage"*); *Jones Motor Co., Inc. v. Pennsylvania Public Utility Commission*, 361 U.S. 11 (1959) (*"Jones Motor"*). This case involves just such a request to the ICC for an interpretation of the operating authority it had issued to a motor carrier subject to its regulatory control.

In 1986, Matlack, Inc. sought a declaratory ruling from the Commission that its motor contract carrier permit issued by that agency authorizes the transportation within Missouri of chemicals that originated outside that State, on the grounds that such service within Missouri is part of a continuous movement in interstate commerce. Matlack's request to the ICC

was prompted by citations it had received from Missouri officials, shortly after it began providing the subject service, who claimed that Matlack was operating in intrastate commerce without possessing the appropriate Missouri authority required therefor. The ICC instituted the requested proceeding, and notice thereof, inviting comments from interested parties, was published both in the *Federal Register* and the *ICC Register*. Twenty eight parties filed comments in the agency proceeding.

In support of its petition, Matlack presented evidence that the service it provides within Missouri for its shipper, Chemtech Industries, Inc. ("Chemtech"), is in interstate commerce and, accordingly, is able to be furnished under its ICC permit. That evidence showed, *inter alia*, that: (1) all of the bulk commodities distributed from Chemtech's facility at St. Louis, Missouri which are transported by Matlack to other points in Missouri are shipped to St. Louis from origins outside that state; (2) the commodities received at the St. Louis facility almost never remain there longer than 30 days before being shipped to Chemtech's Missouri customers; (3) none of the products are used or consumed by Chemtech, and they do not undergo any manufacturing or processing at the St. Louis facility; (4) the principal purpose of the facility is to permit the transfer of Chemtech's large volume inbound shipments into the smaller volumes required for outbound motor and rail transportation; (5) 70 to 80% of the chemicals received at Chemtech's Missouri distribution facilities is subject to existing supply contracts between Chemtech and its Missouri customers, which are entered into prior to the chemicals' shipment from the out-of-state origin; and (6) Chemtech ships the remainder of its products to the distribution facilities to fill requests of known customers based upon their past ordering practices. (Verified Statement of A. Gail Cobb of Chemtech, Pet. App. 43-47.)

In a decision served June 17, 1987, the Commission, after considering this evidence and the written submissions of the other 28 parties who participated in the proceeding, concluded that "it is evident . . . that Chemtech intended for its shipments [within Missouri] to be in interstate commerce". (Pet. App. 17) (Footnote omitted). The ICC said that the facts show that "Chemtech knows, in almost all cases, the final destination from the moment the shipment leaves its out-of-State origin" (*Id.*) (Footnote omitted), and that "Chemtech's intent is to ship not to St. Louis but to its customers." (*Id.* at 18). The ICC then added, again with respect to the shipper's intent as shown by the facts before it, that "Chemtech's intent that the chemicals move to its customers is clearly formed before they reach its facilities, by virtue of its existing customer contracts and projections of the demands of known customers". (*Id.* at 21).

The ICC, thus, concluded that the movements between points in Missouri are in interstate commerce and may be transported by Matlack pursuant to its ICC-issued permit. In so finding, the Commission relied, *inter alia*, upon the decisions of this Court in *Baltimore & O.S.W.R. Co. v. Settle*, 260 U.S. 166 (1922) ("*Settle*") and *Texas & N.O.R. Co. v. Sabine Tram Co.*, 227 U.S. 111 (1913) ("*Sabine*"). (*Id.* at 16-17).

Petitions to reopen this proceeding were denied by the ICC in a decision served December 31, 1987; it did, however, grant the request of petitioner Missouri Division of Transportation ("MDOT") to intervene. (Pet. App. 27, 29).[2] In denying the

[2]In adition to its petition to intervene, MDOT filed a petition to reopen, or in the alternative, for stay pending a request for judicial review. This petition was denied by the ICC in its December 31, 1987 decision (Pet. App. 27, 31, 37).

petitions, the Commission concluded, as it had in its prior decision, that since this is not an adversary proceeding, discovery and an oral hearing are not required. (*Id.* at 31-33). The ICC held that it has primary jurisdiction to decide the issues presented by the Matlack petition (*Id.* at 34), and reaffirmed its determination that the disputed transportation within Missouri is in interstate commerce and, hence, within the scope of the permit it had granted Matlack. (*Id.* at 35-37).

The court of appeals affirmed the ICC's decision. (Pet. App. 1-9). It rejected petitioners' contention that, since the disputed transportation takes place wholly within Missouri, the ICC does not have jurisdiction to decide the issues submitted to it by Matlack; the ICC, in construing the certificates it issues, is empowered to decide this matter. (Pet. App. 4-5).

On the merits, the court below reviewed the facts upon which the ICC had based its decision and concluded that it could not say that the ICC had erred in finding the subject transportation to be in interstate commerce. (Pet. App. 8). The court agreed with the ICC that this Court's decision in *Atlantic Coast Line R.R. v. Standard Oil Co.*, 275 U.S. 257 (1927) ("*Atlantic Coast Line*") is inapposite; in that case, there was no intent at the time of the initial movement of the products from their origin points that they were to be shipped beyond the intermediate storage facilities. (*Id.*)

REASONS FOR DENYING THE WRIT

SUMMARY OF ARGUMENT

1. For the reasons argued hereafter, this case is singularly unworthy of this Court's attention. No federal question has been decided in a way that conflicts with decisions of this Court, nor does this case present any broad question of general importance, significant new interpretation of law, or conflict with decisions of other courts of appeals.

2. The ICC had primary jurisdiction to render the decision below. Decisions of this Court and lower federal courts have consistently held that the ICC is the body with the authority to interpret the motor carrier licenses it issues. Because the ICC had primary jurisdiction, petitioners' preemption and removal arguments must fail.

3. The proceeding below was an informal, non-adversary adjudication. Accordingly, opponents of the ICC's order were not entitled to personal notice of the proceeding, nor to discovery or an oral hearing.

4. The decisions below adhered to well-established standards laid down in the decisions of this Court in determining whether movements between two points in the same state are part of a continuous movement in interstate commerce. Those decisions correctly apply that law, and are amply supported by the facts of record showing the interstate character of the movements.

A. The ICC Had Jurisdiction To Decide This Case

Petitioners' principal attack on the decision below is leveled at the court of appeals' conclusion that the ICC had jurisdiction to decide the issues presented to it by the Matlack petition. (Petition at 10-18). That assault, however, is unavailing.

The court noted that "[t]he question is whether the transportation from the distribution point in Missouri to customers in Missouri is part of a continuous interstate operation originating outside of Missouri and is thus covered by the ICC certificate, or whether the second leg of transportation is separate and wholly intrastate". (Pet. App. 5). Having stated the question, the court then concluded that "the issue is clearly within the ICC's jurisdiction in interpreting whether its certificate covers the transportation", citing, among others, this

Court's decisions in *Service Storage*, *Nelson*, and *Jones Motor*, and the decisions in *Merchants Fast Motor Lines, Inc. v. ICC*, 528 F.2d 1042 (5th Cir. 1976) ("*Merchants*") and *Gray Lines Tour Co. v. ICC*, 824 F.2d 811 (9th Cir. 1987) ("*Gray Line*"). (*Id.*)

The ability of the ICC to decide whether Matlack can serve Chemtech within Missouri under its ICC authority cannot be seriously disputed; the decisions relied upon by the court below, as well as other authority, clearly establish that the Commission has primary jurisdiction to interpret the licenses it issues. See, *e.g.*, *Service Storage*, 359 U.S. at 177; *Nelson*, 355 U.S. at 558; *Gray Line*, 824 F.2d at 815; *Merchants*, 528 F.2d at 1044-45; *State of Texas v. United States of America and Interstate Commerce Commission*, 866 F.2d 1546, 1551-1554 (5th Cir. 1989); *George Transfer and Rigging Company, Inc. v. United States*, 380 F. Supp. 179, 185 (D. Md. 1974) (3-judge court), *aff'd. mem.*, 419 U.S. 1042 (1974); *Contractors Cargo Company v. United States*, 299 F. Supp. 287, 290 (C.D. Cal. 1969) (3-judge court), *aff'd. mem.*, 397 U.S. 39 (1970). The basis for this primary jurisdiction is the fact that "[t]he structuring and interpretation of a certificate of public convenience and necessity is an exercise of the Commission's special expertise." *R-C Motor Lines, Inc. v. United States*, 350 F. Supp. 1169, 1171 (M.D. Fla. 1972) (3-judge court), *aff'd. mem.*, 411 U.S. 941 (1973).

This Court made it clear in *Service Storage* that there cannot be concurrent state and federal litigation over whether transportation is embraced within a carrier's interstate authority; instead "the interpretation of [a motor carrier's] interstate commerce certificate should first be litigated before the Interstate Commerce Commission". 359 U.S. at 173. Conflicts between state and federal authorities can be avoided if such interpretations are "made in the first instance by the authori-

ty issuing the certificate and upon whom the Congress has placed the responsibility of action". *Id.* at 177.

Faced with this monolithic authority confirming the ICC's jurisdiction to decide this case, petitioners make several futile attempts to distinguish it. First, they argue that *Service Storage* and the other decisions of this Court relied upon by the court below are inapposite because, unlike this case, "the transportation movements in question *actually crossed state boundaries*". (Petition at 11) (Emphasis in original). But here, just as in *Service Storage*, the question is whether the subject movements constitute interstate transportation, and are thus able to be transported by Matlack under its ICC permit. The movements involved in this case also "actually cross state boundaries" since all of the chemicals transported within Missouri by Matlack originate outside that state.

But the issue does not turn on application of some mechanical test to determine if boundaries are traversed; the question is whether the shipments are part of a continuous interstate movement originating outside Missouri which may be transported by Matlack under its ICC permit.[3]

Petitioners further contend that no interpretation of Matlack's ICC permit was here involved; accordingly, the ICC does not have primary jurisdiction. (Petition at 11-12). This

[3]In response to arguments identical to those made by petitioners here that the subject shipments are "on their face intrastate", while those in *Service Storage* crossed state lines, the court of appeals in *Texas* said, at 866 F.2d at 1552:

> This argument fails. By directing attention to the character of the shipments involved, Texas invites us to decide the jurisdictional issue by prejudging the substantive question. *Service Storage* expressly states that "interpretations of federal certificates" should be made by the issuing agency.

The court further noted that, as in this case, the traffic involved in *Texas* did traverse state lines, just as did the traffic in *Service Storage*. 866 F.2d at 1552.

is incorrect. The question presented to the ICC was whether Matlack's operations are in interstate commerce, as its ICC permit requires in order for operations to be performed thereunder. The ICC addressed that query in its decisions below, and said that Matlack's permit authorized such service. (Pet. App. 34). That reply was a proper construction of the "interstate commerce" requirement of the Matlack permit and, as recognized by the court below (Pet. App. 5), was an appropriate response to a legitimate issue of authority interpretation. *See also, Texas*, 866 F.2d at 1551-1554. The Commission, in short, was asked to, and did, interpret the permit it had issued to Matlack.[4]

Petitioners cite not a single decision of this Court in support of their position that *Service Storage*[5] is not dispositive

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[4]Indeed, this was the same issue of interpretation as that involved in *Service Storage*. As the court in *Texas* said:

> . . . The Supreme Court [in *Service Storage*] said the ICC certificate "on its face covers the whole operation. . ."; the crucial issue that divided Virginia and the ICC was whether or not the transport was in fact intrastate rather than interstate. 359 U.S. at 178, 79 S.Ct. at 718.

866 F.2d at 1552. The court added that "[t]he fact that a route is geographically intrastate does not imply that traffic on the route is intrastate in character, and the character of the traffic is a question within the ICC's primary jurisdiction." 866 F.2d at 1553. In any event, as this Court held in *Weinberger v. Hynson, Westcott and Dunning, Inc.*, 412 U.S. 609, 625-627 (1973 "*Weinberger*"), an agency has "jurisdiction to determine whether it has jurisdiction."

[5]Petitioners also attempt to distinguish *Service Storage* by claiming that its "rationale" of avoiding conflicting interpretations as to the meaning of a carrier's certificate by several states, does not apply here where only a single state — Missouri — is involved. (Petition at 11). By requiring initial resort to the ICC, *Service Storage* seeks to avoid conflicting ICC/state constructions of ICC licenses. 359 U.S. at 177-178. There is simply nothing in *Service Storage* limiting its applicability only to cases where more than one state is offering an interpretation as to the character of the same traffic.

of the jurisdictional issue. Indeed, the only authority petitioners offer is the decision of the United States Court of Appeals for the Third Circuit in *Puerto Rico Maritime Shipping Authority v. Valley Freight System*, 856 F.2d 546 (1988). That decision, however, did not involve the authority of a federal agency to determine whether a license issued by it authorized certain transportation. The failure of the Third Circuit to discuss *Service Storage* or the other authority here set forth demonstrates the irrelevance of that decision to the license interpretation issue here involved, and requires that it be given no weight.[6]

Included in petitioners' attack on the ICC's jurisdiction is an argument that the agency's interpretation of Matlack's permit unlawfully preempted Missouri's enforcement action against it, citing *Louisiana Public Service Commission v. Federal Communications Commission*, 476 U.S. 355 (1986) (Petition at 15-16). However, the ICC's action here could not be preemptive since it was within its primary jurisdiction. The Commission's decision constituted a proper exercise of its

[6]Petitioners complain that the ICC's decision will hinder their enforcement efforts by requiring them to file a petition with the ICC each time they wish to challenge the operations of ICC-regulated carriers within their borders. (Petition at 14-15.) However, states have been required to follow that procedure for at least the past 30 years, ever since this Court instructed them in *Service Storage* that their remedy in such situations was a complaint to the ICC under the Interstate Commerce Act. By petitioning the ICC "the possibility of a multitude of interpretations of the same federal certificate by several states will be avoided and a uniform administration of the Act achieved." 359 U.S. at 179. In any event, the need for state complaints to the ICC should diminish because of recent interprtations of this issue by the Commission. In the past three years, the ICC has issued numerous declaratory orders explaining the transportation that can be performed under motor carrier authority granted by it. (Petition at 16-17). These decisions provide clear guidance to motor carriers, shippers, and state officials alike as to the parameters of interstate vs. intrastate service; as a result, the need for future state enforcement in this area should be reduced.

well-established authority to interpret the permits it issues and, in so doing, determine if such permits authorize the subject transportation. If they do, then Missouri has not in any way been preempted since it has no authority to regulate that activity. *Louisiana Public Service Commission* does not hold to the contrary. There, the Court held that the FCC could not regulate intrastate telecommunications service. 476 U.S. at 370. The Court did not decide, however, that the FCC had no authority to make the initial determination as to what facilities were in interstate commerce — which it could regulate — as opposed to those in intrastate commerce — which it could not. Here, the ICC is not claiming regulatory authority over any transportation that it acknowledges is in intrastate commerce. Under these circumstances, petitioners' notions of preemption are misplaced.[7]

B. The Remainder of Petitioners' Arguments Are Similarly Without Merit

1. Petitioners contend that it was unlawful for Matlack to be allowed to "remove" its federal defenses to the Missouri prosecutions from state court to the ICC. (Petition at 18-21).[8] However, no such removal of a matter within Missouri's jurisdiction here occurred. None of the cases relied upon by petitioners in support of this argument[9] involved issues within the primary jurisdiction of a federal agency and a request to that agency for a determination thereof. As with their preemp-

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[7]See also, *Texas*, 866F.2d at 1553.

[8]The traffic tickets received by Matlack had been docketed for prosecution as criminal misdemeanor charges in Franklin County, Missouri Circuit Court.

[9]*Public Service Commisson of Utah v. Wycoff Co.*, 344 U.S. 237 (1952) (*"Wycoff"*); *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804 (1986); *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1 (1983). (Petition at 19-20).

tion argument, petitioners seem to lose sight of the primary — if not the exclusive — role this Court has conferred upon the ICC in interpreting the authority it issues.

The decision in *Wycoff* is inapposite for other reasons as well. First, no case or controversy was there present, a prerequisite to issuance of the declaratory judgment sought from the federal district court. 344 U.S. at 242-243. There was no indication, for example, that the State had taken any enforcement action against the motor carrier seeking the declaratory judgment; a fact the Court deemed significant. 344 U.S. at 247-248. However, the "case or controversy requirement does not restrict an agency's authority to issue declaratory rulings under 5 U.S.C. § 554(e) . . ." *Texas*, 866 F.2d at 1551. In any event, a controversy does here exist; Missouri believes that the Matlack operations are in intrastate commerce for which Missouri authority and the use of intrastate rates are required. In fact, not only is a significant disagreement among the parties present but, as noted, Missouri issued citations against Matlack for the transportation it alleged to be intrastate and Matlack faced criminal prosecutions arising out of such citations (Petition at 19).

Finally, the action in *Wycoff* was filed in a federal district court, not before the ICC. Even though it was decided before *Service Storage*, *Wycoff* foreshadows that later decision by concluding that, even aside from the fatal absence of a case or controversy, a petition for declaratory judgment by a court cannot be employed "to forestall proceedings by . . . the Interstate Commerce Commission or . . . agencies that are authorized to try and decide such an issue in the first instance." 344 U.S. at 246.[10] While this Court's later decision in *Service Storage* established the ICC's authority to determine the

[10] *See, also, Texas*, 866 F.2d at 1553-1554.

meaning and applicability of the permits it issues, and it is that decision which governs this case, even *Wycoff* suggests that had the parties there sought a decision by the ICC, rather than the district court, its conclusion might have been different.

2. Petitioners also contend that this Court should review and reverse the decision of the court below because petitioner MDOT, who participated in the ICC proceeding by filing a petition to reopen and alternative request for stay, was not provided with personal notice thereof, and because the ICC's procedures deprived petitioners of a fair adjudication. (Petition at 21-24). Even assuming that MDOT's actual participation in the agency proceeding does not defeat its notice argument, petitioners concede that notice of the ICC's proceeding was provided by publication in both the *Federal Register* and the *ICC Register*. (Petition at 21). Petitioners make no claim that the notices were inaccurate or incomplete; accordingly, their publication constituted legally sufficient notice of the ICC proceeding to all interested persons. *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 384-385 (1947).[11]

Neither was the ICC required to conduct an oral hearing in this case, or to grant petitioners' requests for discovery.

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[11]MDOT's claim that it was entitled to a more personalized form of notice than that provided all other intersted parties in this case — as noted, 28 parties responded to that notice and filed comments with the ICC — is allegedly supported by this Court's decision in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). That case, however, did not involve publication of an agency notice in the *Federal Register* which, as seen, constitutes legal notice to all concerned. Instead, in *Mullane* a trust company published in a local newspaper notice of a judicial action that would finally determine the rights of certain parties. Indeed, the action noticed would deprive those parties of certain property rights which, under the Due Process Clause of the Fourteenth Amendment, required that personal notice be afforded them. 339 U.S. at 313. No such denial of MDOT's property rights resulted from the ICC proceeding in which, in any event, it participated.

An agency is only required to grant discovery and hold a hearing in an adjudicatory proceeding if the matter comes within the provisions of Section 554(a) of the Administrative Procedure Act ("APA"), 5 U.S.C. § 554(a). That Section "applies . . . in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing." Although this was an adjudicatory proceeding as defined in 5 U.S.C. § 551(7), despite petitioners' repeated mischaracterizations of it as such, it was not adversary in nature. Section 554(e) of the APA, which authorizes informal declaratory order proceedings such as here involved, does not require a formal oral hearing process in such proceedings, nor does Section 554(a) impose a "blanket" oral hearing requirement on all agency adjudication.[12] The ICC gave all interested parties a full opportunity to participate; it was not required to employ a more formal procedure designed for adversary trial-type proceedings.[13]

3. With respect to the merits of Matlack's petition, the court of appeals concluded that the ICC correctly determined that the subject shipments moved in interstate commerce and

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[12]Even if Section 556 were applicable to this proceeding, it does not require an oral hearing. This Court said in *United States v. Florida East Coast Railway Company*, 410 U.S. 224, 240 (1973), that the term "hearing" as used in the APA "does not necessarily embrace either the right to present evidence orally and to cross-examine opposing witnesses, or the right to present oral argument to the agency's decisionmaker." *See, also*, 410 U.S. at 241. In *Texas*, the Fifth Circuit, describing the same procedure employed by the ICC in interpreting the ICC authority involved in that case, said the " 'paper hearing' conducted by the ICC provided all parties with adequate opportunity to comment, and so conformed to the APA's hearing requirements". 866 F.2d at 1555.

[13]*Vermont Yankee Nuclear Power Corp. v. Natural Res. D.C.*, 435 U.S. 519, 543 (1978) (Administrative agencies "should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties."); *Weinberger*, 412 U.S. at 625-26.

were, thus, able to be transported by Matlack under its ICC permit. (Pet. App. 6-8). In attacking this conclusion, petitioners argue that two decisions of this Court compel a different result. (Petition at 24-26.)

Petitioners contend that the facts in this case are "virtually identical" to those in *Atlantic Coast Line,* in which the Court found certain single-state rail movements to be in intrastate commerce. As noted above, both the court of appeals and the ICC found that *Atlantic Coast Line* is readily distinguishable. (Pet. App. 8, 18-19). First and foremost, in that case there was no intent at the time of the initial movement of the products from their out-of-state origins that they were to be shipped beyond the intermediate storage facilities. The Court, in finding the shipments from those facilities to be intrastate, said that "[t]here is nothing to indicate that the destination of the oil is arranged for or fixed in the minds of the sellers beyond the primary seaboard storages of the plaintiff company . . ." 275 U.S. at 269.

Indeed, there could be no intent in that case at the time of the initial shipment that the goods move beyond the storage point since the movements inbound thereto and outbound therefrom were arranged by *two different shippers*. 275 U.S. at 267, 269. This duality of shippers destroyed the continuity of the requisite intention and, thus, of the movement. Only after the fuel oil had come to rest at the storage facilities did the second shipper decide where, among scores of possible destinations, the oil would be shipped. 275 U.S. at 265, 269. As the court of appeals in *Texas* said in agreeing with the court below that *Atlantic Coast Line* was not apposite to the transportation involved in that case:

> [I]n *Atlantic Coast Line* the shipments were to warehouses run by local, independent wholesalers, *who themselves designated the final destination of the*

cargo. The Supreme Court explained the importance of this fact in determining whether shipments out of the warehouse were the continuations of an interstate movement:

> Neither the sellers, who deliver the oil, nor the railroad company, that aids the delivery of the oil to the storage tanks and tank cars at the seaboard, has anything to do with determining what the ultimate destination of the oil is . . .
>
> In contrast here, . . . the out-of-state shipper, determines the final destination.

866 F.2d at 1557 (Emphasis added) (Footnotes omitted). In short, the "controlling fact" (Pet. App. 8) in *Atlantic Coast Line* is that the goods were stockpiled at the storage point for eventual movement from that point to ultimate customers designated by persons other than the original out-of-state shippers. 275 U.S. at 269. Here, on the other hand, the ICC found and the facts show that there is a single shipper — Chemtech — who "intends that its product continue movement through St. Louis for delivery to known customers". (Pet. App. 8). As described in the Statement, *supra*, Chemtech intends that its shipments go to its identified customers in Missouri either pursuant to preexisting supply contracts or similar sales arrangements, or to fill requirements of those known customers based upon their past ordering practices. In both cases, the criteria established by this Court for determining that these single-state movements are in interstate commerce are satisfied —Chemtech intends that the goods come to rest only after they have moved through its intermediate distribution facilities and have reached the locations of its known customers. See, *Walling v. Jacksonville Paper Co.*, 317 U.S. 564, 567-69 (1943); *Settle*, 260 U.S. at 170-171, 173-74; *Sabine*, 227 U.S. at 125, 126, 130; *Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498, 526-527 (1911) ("*Southern*

Pacific''). See also, Country Maid, Inc. v. Haseotes, 324 F. Supp. 875, 877 (E.D. Pa. 1971). Hence, *Atlantic Coast Line* is inapplicable.[14]

Petitioners also assert that the court below failed to apply this Court's decision in *Pennsylvania R.R. v. Public Utilities Comm'n. of Ohio*, 298 U.S. 170 (1936). In that decision, the Court held that a single-state movement by rail was not part of interstate transportation because the preceding movement into the State by private carriage was not ''transportation'' within the meaning of the Interstate Commerce Act. This decision does not apply, however, to single-state *motor* movements preceded by exempt interstate movements.

As the ICC explained in a recent decision,[15] its jurisdiction over rail and motor transportation is not identical. Its rail jurisdiction is limited to transportation from one state to another and, with certain limited exceptions involving import and export traffic, does not include transportation conducted wholly within one state. (App., p. 3a).[16] The ICC's motor car-

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[14]Petitioners claim (Petition at 26) that Chemtech is not the ''shipper'' because it is the purchaser, and not the seller, of the goods on their movements inbound to the St. Louis facilities. Chemtech, as seen, ''cause[s] [the commodities] to be shipped'' to its intermediate distribution facilities. (Pet. App. 45). As such, it is the ''shipper'' of such commodities even though, on the inbound leg to its facilities, it is the purchaser thereof. *North Carolina Utilities Commission v. United States*, 253 F. Supp. 930 (E.D.N.C. 1966) (3-judge court) (*''North Carolina''*). This is consistent with Chemtech's statements that at all times it intends that the chemicals are to be shipped to their ultimate destinations.

[15]No. MC-C-3002, *Victoria Terminal Enterprises, Inc. — Transportation of Fertilizer Within Texas — Petition For Declaratory Order*, served February 3, 1989, petition for review pending, United States Court of Appeals for the Fifth Circuit, No. 89-4114, *Steere Tank Lines, Inc. v. Interstate Commerce Commisson, et al.* A copy of the ICC's February 3, 1989 decision is included as an appendix hereto.

[16]*See, Long Beach Banana District v. Atchison, T. & S.F. Ry. Co.*, 407 F.2d 1173 (9th Cir. 1969), *cert. denied*, 396 U.S. 819 (1969).

rier jurisdiction is broader, and authorizes the ICC to regulate such transportation in interstate and foreign commerce; interstate commerce is defined as "commerce between any place in a State and any place in another State . . . whether such commerce moves wholly by motor vehicle or partly by motor vehicle and partly by rail, express, *or water*". (App., p. 3a) (Emphasis added). In sum, with respect to motor transportation, the ICC has jurisdiction over any such transportation which is a part of interstate commerce.

In contrast to the inapposite precedent relied upon by petitioners, the ICC and the court below correctly applied the numerous decisions of this Court, lower federal courts, and the ICC that require the conclusion that under the facts here present, the subject transportation is in interstate commerce.[17] Petitioners make no attempt to challenge the applicability of these decisions to this case; indeed, no such challenge is possible.

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[17]Those decisions include, among others, *Settle; Sabine; North Carolina; Southern Pacific; Rogers Transfer, Inc. Declaratory Order*, 126 M.C.C. 448 (1977). Other decisions which support the actions of the ICC and the court below include *Walling*, 317 U.S. at 567-69 and *Texas*, 866 F.2d at 1556-1561.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

William H. Borghesani, Jr.*
Terrence D. Jones
1150 17th Street, N.W.
Suite 1000
Washington, D.C. 20036
(202) 956-5600

Attorneys for Respondent
National-American Wholesale
Grocers Association

*Counsel of Record

OF COUNSEL:

Keller and Heckman
1150 17th Street, N.W.
Suite 1000
Washington, D.C.20036

Dated: August 9, 1989

APPENDIX

INTERSTATE COMMERCE COMMISSION

DECISION

No. MC-C-30002

VICTORIA TERMINAL ENTERPRISES, INC. — TRANSPORTATION OF FERTILIZER WITHIN TEXAS — PETITION FOR DECLARATORY ORDER

Decided: January 27, 1989

Pursuant to 49 U.S.C. 10322(g)(1), we reopened this proceeding for the limited purpose of reconsidering that portion of our prior decisions relating to our jurisdiction over the ex-water motor movements involved in this case.[1]

In our prior decisions (served December 15, 1987 and April 29, 1988), we accepted (without analysis) the opponents' assertion that the Commission lacks jurisdiction over the single-State motor carrier movements that involve traffic having a prior bulk barge movement from an out-of-State origin. We then concluded that, even though the Commission lacks regulatory jurisdiction over such movements, it has the responsibility and expertise to determine whether those single-State movements constitute a part of a continuing interstate transportation movement and hence are beyond the (intrastate) regulatory purview of the States.

The proposition that the ex-barge movements are not subject to Commission regulation was based in large part on a review board decision in *Behnken Truck Service, Inc., Ext.*

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[1]On January 18, 1989,the United States Court of Appeals for the Fifth Circuit granted our motion for voluntary remand in Nos. 88-4001 and 88-4379, *Steere Truck Lines, Inc. v. Interstate Commerce Commission and United States of America,* to permit us to reconsider this issue.

- *Exbarge Traffic*, 103 M.C.C. 787 (1967). *Behnken*, in turn, was based upon a decision of the Supreme Court in *Pennsylvania Railroad Co. v. Public Utilities Commmission of Ohio*, 298 U.S. 170 (1936). In *Pennsylvania*, the Court held that a single-State movement by rail was not part of interstate transportation (and thus could be regulated by the State) because the preceding movement into the State by private carriage was not "transportation" within the meaning of the Interstate Commerce Act.

In *Behnken* (and several earlier decisions), the *Pennsylvania* rationale was applied in determining that the Commission lacked jurisdiction over a single-State motor carier movement of goods that had entered the State by an exempt move. The board felt constrained to this conclusion because:

> The Pennsylvania case made it clear that not all commerce is transportation; that transportation begins only when merchandise has been placed in the possession of a carrier subject to economic regulation. . . .

Behnken, supra, 103 M.C.C. at 796, citing *Motor Transportation of Property Within a Single State*, 94 M.C.C. 541 (1964).

Upon closer analysis, we believe the review board erred in the *Behnken* line of cases in applying the holding of *Pennsylvania*, regarding the extent of the ICC's *rail* jurisdiction, to a determination of its *motor* jurisdiction. This conclusion is based on the original (pre-recodification) language of the Interstate Commerce Act setting forth the Commission's jurisdiction over these modes.[2]

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[2]By Act of October 17, 1978, Pub. L. 95-473, 92 Stat. 1466, the Interstate Commerce Act was recodified. Section 3(a) provides that the recodification "may not be construed as making a substantive change in the laws repealed." *Atchison, T., & S.F. Ry. Co. v. United States*, 617 F.2d 485, 490 (7th Cir. 1980), *Trailer Marine Transport Corp. v. FMC*, 602 F.2d 379, 383 n.18 (D.C. Cir. 1979).

In the *rail* area, the original Interstate Commerce Act conferred upon the ICC juridiction over the transportation by railroad (as pertinent here) "from one State . . . to any other State" (section 1(1)), but not rail transportation that is conducted "wholly within one State" (section 1(2)(a)).

By contrast, in the *motor* area, Congress granted the Commission jurisdiction over transportation "in interstate and foreign commerce" (section 202(a)) and reserved to the States the power to regulate "intrastate commerce by motor carriers on the highways thereof" (section 202(b)(1)). It defined "interstate commerce" as "commerce between any place in a State and any place in another State. . . whether such commerce moves wholly by motor vehicle or partly by motor vehicle and partly by rail, express, or water" (section 203(10)).

Thus, the distinction made in the *Pennsylvania* case between "transportation" and "commerce" is necessary in the rail area, but not in the motor area. The statute does not preclude the Commision from licensing and regulating *motor* carriage that is conducted in interstate commerce, even if it does not regulate the transportation at the moment it crosses State lines.

Moreover, logically the fact that the ICC does not regulate the water portion of the movement ought not to be a critical determinant of its jurisdiction over the motor portion. If the fertilizer in this case had come into Texas by ship from a foreign country, the Commission would not regulate its mode of entry. Yet in that situation it is well settled that the Commission could regulate the subsequent movement by motor carriage within a single State (so long as the continuity of movement is not broken). See, for example, *Long Beach Banana Dist. v. Atchison, T. & S.F. Ry. Co.*, 407 F.2d 1173 (9th Cir. 1969), *cert. denied* 396 U.S. 819; *North Carolina Utilities Commission v. United States*, 253 F. Supp. 930 (E.D.N.C. 1966 (3-judge court).

In sum, we believe that whether a particular motor movement is considered to be interstate or intrastate should not depend upon how the fertilizer being moved by truck within Texas happened to cross the State line.[3] Therefore, we expressly overrule the review board decision in *Behnken*.[4]

This decision will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. Our prior decisions in this case are modified to the extent set forth above.

2. This decision is effective on the date of service.

By the Commission, Chairman Gradison, Vice Chairman Simmons, Commissioners Andre, Lamboley, and Phillips. Vice Chairman Simmons and Commissioner Lamboley dissented with separate expressions.

Noreta R. McGee
Secretary

(SEAL)

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[3]Compare, *ICC v. Texas*, ____ U.S. ____, 107 S.Ct. 787, 793 (1985) (ICC to determine the proper interrelationship of different modes of transportation and to impartially regulate competing modes).

[4]To the extent that the *Behnken* analysis might appear to have been reaffirmed in Ex Parte No. MC—182, *United States Department of Transportation — Petition for Rulemaking — Single State Transportation in Interstate or Foreign Commerce* (not printed) (January 28, 1987), and other cases, we disavow the statements made in those cases on this point.

VICE CHAIRMAN SIMMONS, dissenting:

I believe that the approach taken by the majority in overturning the *Behnken* precedent is arbitrary and capricious. The decision overturns *Behnken* without comment or notice. Furthermore, the majority's justification for doing so is unpersuasive. *Behnken* correctly relied on *Penn. R. Co. v. Public Utilities Commission of Ohio*, 298 U.S. 170 (1936). There the Supreme Court established the proposition that when transportation within a single state has been preceded by out-of-state barge movements, commerce for ICC purposes does not actually begin until placed in the possession of a carrier subject to regulation by us. The contention that the *Pennsylvania* principle is triggered only when rail movements are involved has no basis in law. The principle applies equally to motor carrier movements preceded by out of state barge movements. Nor has Congress ever made such distinction either directly or by inference. Moreover, Congress had the opportunity to make its intentions clear and overrule *Behnken* with the passage of the 1980 Motor Carrier Act. As the Supreme Court observed: "If the concept of transportation is in need of expansion, it is for the legislative department of the government to determine how great the change shall be". 298 U.S. 177.

COMMISSIONER LAMBOLEY, dissenting:

I do not agree with this attempt by the majority to bolster its original decision's jurisdictional basis. Additionally, and more fundamentally, I reaffirm my dissent to the ultimate holding of this case as stated in my dissenting separate expression to the decision served December 15, 1987.